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88-1444

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

-vs-

FMC CORPORATION and GEORGE E. MOEHRINGER,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, FMC CORPORATION

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69 pp

QUESTIONS PRESENTED

1. As set forth by Petitioner in Petition for Writ of Certiorari.

2. As set forth by Petitioner in Petition for Writ of Certiorari.

3. Did the denial of Petitioner's motion for recusal violate the Due Process Clause of the Fourteenth Amendment.

List of FMC Corporation
(Parent Company)
Subsidiaries & Affiliates
Not Wholly Owned by FMC

Asia Lithium Corporation (Ajia Lichimu Kabushiki Kaisha)
Yodogawa-Ku, Osaka, Japan
Note: Partly owned by Honjo Chemical Company, Ltd.

CBV - Industria Mecanica, S.A.
Rio de Janeiro, Brazil

Centocor, Inc.
Malvern, Pennsylvania

The Chitin Company, Inc.
Cambridge, Massachusetts 02139

Electro Quimica Mexicana, S.A. de C.V.
Mexico, D.F., Mexico
Note: Majority owned by Interindustrias, S.A. de C.V.

FMC Europe, S.A. (Formerly Luceat, S.A.)
Sens (Yonne), France

FMC Gold Company
Chicago, Illinois

FMC-Kramer S.A. Industria E Comercio
Jundiai, State of Sao Paulo, Brazil
Note: Half owned by Kramer Administracao, Ltd.

FMC de Mexico, S.A. de C.V.
Mexico, D.F., Mexico
Note: Majority owned by Group Interindustrias, S.A. de C.V.
Foret, S.A.
Barcelona, Spain

Note: Partly owned by "Coproqui," Commercial e Industrial de Productos Quimicos, S.A.

Freeport/FMC Foreign Sales Corporation
St. Thomas, U.S. Virgin Islands
Note: Majority owned by Freeport Gold Co.

Huron Forge and Machine Company
Detroit, Michigan

L. H. Company, Ltd. (LH Kabushiki Kaisha)
Osaka, Japan
Note: Partly owned by Honjo Chemical Company, Ltd.

Link-Belt Construction Equipment Company
Bannockburn, Illinois
Note: Majority owned by Sumitomo Heavy Industries Ltd.

"Perorsa" - Peroxidos Organicos, S.A.
Barcelona, Spain
Note: Partly owned by LaPorte Industries Ltd. and Solvay

SeparaSystems Inc. (Formerly FMC/Du Pont Food Separations Inc.)
Santa Clara, California
Note: Half-owned by E.I. Du Pont de Nemours and Company

Teknowledge, Inc.
Palo Alto, California

Thai Peroxide Company, Ltd.
Bangkok, Thailand
Note: Half-owned by Indo-Thai Synthetics and its designees

Tokai Electro-Chemical Company, Limited
(Tokai Denka Kogyo Kabushiki Kaisha)
Tokyo, Japan
Note: Majority owned by Asahi Denka Kogyo K.K. and Partly owned by: Furukawa Denki Kogyo K.K.; Fuji Denki Seizo K.K.; The Daiichi Kangyo Bank, Ltd.; Furukawa Kogyo K.K.; Asahi Seimei Hoken Sogo Kaisha

Turegano, S.A.
Valencia, Spain

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STATEMENT OF FACTS

Respondent FMC waives presenting a Statement of the Case except where necessary to correct inaccuracies and omissions in Petitioner's Statement.

Shortly after Petitioner commenced employment with FMC, Moehringer, her manager, became disappointed with her performance. Her work significantly exceeded time estimates and was programmed inefficiently and unsuccessfully. Petitioner refused Moehringer's assistance and would not demonstrate her work to him. Moehringer communicated this disappointment to his manager, Erjavec, who urged Moehringer to continue working with Petitioner to improve her performance because the position was a difficult one to fill

and because FMC had spent about $6,000 on an agency fee to recruit Petitioner. (8T141, 142, 143-144, 145-151). The District Court found the testimony of Moehringer to be credible and where it was in contravention to Petitioner's testimony, that Petitioner's testimony was not worthy of belief (App. 10a).

In February 1980, Petitioner was given an assignment known as the Farms Index Project. It was a medium-sized project with an intermediate level of difficulty estimated to take approximately six weeks (8T162-163). Petitioner spent 22 weeks on this project and never satisfactorily completed it as it only functioned minimally (8T164). The program was replaced the following year by another programmer outside of Moehringer's group. The custo-

mer was dissatisfied with Petitioner's work and did not use Moehringer's group to complete the assignment or for any other work for five years (8T166).

During Petitioner's work on the Farms Index Project, she refused to communicate interim progress to Moehringer. She avoided him, skipped scheduled meetings, and would hang-up if he called on the telephone to inquire about the program. She did not show him a single line of code, a flow diagram or documentation. Moehringer sensed a major problem in this project and communicated his fears to Erjavec (8T152-153). Subsequently, Moehringer, in May/June 1980, recommended to Erjavec that Petitioner be terminated from employment (2T24, 6T162-163). Erjavec

did not terminate Petitioner at this time (6T163).

With reference to the alleged Middleport incident (Petition pgs. 9-10), the District Court did not find Petitioner's Account to be credible (App. 19a). As stated therein,

> Plaintiff's account was not credible. Based upon my assessment of the credibility of Golin and Moehringer, I find that Moehringer's denial of the incident was credible. (Vol. 9, p. 68, line 1). I am unable to give any credence to the plaintiff's interpretation of the facts. As was the case throughout the trial, the evidence simply does not support the plaintiff's version of the facts, nor does it support the inferences and conclusions the plaintiff draws and seeks to have this Court draw. (App. 18a-19a).

As stated by Petitioner (Petition p. 11), she was temporarily transferred to the A&IS group and was rated by David Hall. During the temporary assignment, Hall was unable to afford much time to direct observation of Petitioner's work, and when requested by Erjavec for an evaluation in preparation for the November performance review due Petitioner, Hall merely reported that she was standard, due to lack of evidence to the contrary (6T236). In rating her, Hall did not want to see her transferred to his group as he did not feel she could contribute as she did not have the background to discuss problem areas with users or the ability to formulate problem solutions (6T269-270).

Subsequent to Petitioner's return to Moehringer's group, Moehringer prepared the

11 page evaluation of Petitioner referenced in the Petition (pg. 12). The purpose of the review was to prepare for Petitioner's annual review and to report to Erjavec details concerning projects Petitioner had worked on as Moehringer was sure she would not be a successful programmer (9T26).

Because of the disparity between Petitioner's assertions and Moehringer's performance evaluation and because Hall was unable to supervise her closely enough to provide an independent estimate, Erjavec decided to replicate some of the work previously done by her to attempt an independent evaluation and formulate a more precise basis on which to recommend annual salary action for Petitioner. He selected an assignment on which she had expended and logged 44 hours and had not completed.

Moehringer had estimated that it would take approximately one day (9T28-29). Although he had little recent computer programmer experience and had never used this specific computer before, Erjavec completed the assignment in 9 hours (6T102-103, 165, 229). He concluded that Moehringer's time estimate was reasonable (6T230). Erjavec subsequently rated Petitioner a 2, (satisfactory, but requires improvement-some objectives not met) (App. 24a).

Petitioner (Petition pgs. 16-17) references testimony of Gail Wright and Jeanne Root in which they stated that Moehringer stood close when he spoke to them. Moehringer stood close to males and females, and, although this habit made them uncomfortable, they did not find it offensive (App. 47, 3T 115-116, 176). Root's

responsibility while being supervised by Moehringer was to convert existing programs to a more sophisticated system brought on board by FMC (3T 117-121).

Petitioner (Petition p. 18) alleges Hall's project delays, etc. were performance failures. There is nothing in the trial record supporting Petitioner's claims that the delay's, etc., were performance failures.

With reference to Robert Kiessling beginning work at 9 a.m. (Petition pgs. 18-19), Kiessling was not an FMC employee but rather an independent contractor who was contracted for with the understanding that he could begin work at 9 a.m. (8T 92-94). Hall, whose hours varied, was not under Moehringer's supervision (6T 257, 259). Golin did not offer the testimony of

anyone else in her group, or the testimony of anyone who worked under Moehringer, to corroborate her claim that she was in some way singled out by being required to work regular hours (App. 33a-34a).

Petitioner in her Petition (pgs. 20-21) references a conversation with Burton Friedman in which she allegedly told Friedman her belief that Moehringer denied her request because she rejected Moehringer's sexual advances. This testimony, although not specifically refuted, was not corroborated.

On page 21 of the Petition, Petitioner references a March 9, 1981 conference with Moehringer. Prior to Petitioner advising Moehringer that she was reluctant to go to his office because he made passes at her, Moehringer had advised Petitioner that he

had recommended to Erjavec that she be terminated (5T 198-199, 9T 41-42, App. 34-35).

With reference to the alleged sexual acts complained of by Petitioner, Moehringer denied ever sexually harassing Petitioner or committing any of the acts alleged (8T 155-156, 9T 46, 68, 69, 71).

On page 23 of the Petition, Petitioner alleges that Erjavec suggested to her that she must provide the names of other woman, in order to prove Moehringer's bias (App. 43-44). Erjavec merely suggested that Petitioner provide names of other woman (6T156) in order to prove Moehringer's alleged bias (6T156, 161). He suggested that Petitioner provide the names of other woman in light of the fact that the internal investigation by FMC was drawing

to a close without substantiation of Petitioner's claim and if FMC found her allegations to be groundless, then the original plan was going to proceed, which was the termination of Petitioner based upon poor performance (6T156-157). This, in fact, was done by FMC. Erjavec never told Petitioner that unless she gave FMC names of witnesses, that they would let her go (6T145).

With reference to the testimony of Barbara A. Dvorak (Petition pg. 24), upon Petitioner's complaint of sexual harassment, FMC appointed Judith Schunn and Suzanne Donnelly, professional personnel employees from outside FMC's Princeton facility, to conduct an internal investigation into the allegations (6T175). These investigators interviewed Petitioner,

Erjavec, Moehringer, and a large number of FMC employees (6T187). One female employee, Barbara Dvorak, went to Erjavec before she had been contacted by these investigators and suggested that she should be interviewed because she believed she had a similar experience with Moehringer (3T28, 6T204-205). There is no indication that the investigators did not intend to talk to Dvorak; the record indicates that the investigators simply had not had the opportunity to talk to her prior to the time she raised the concern with Erjavec. The FMC investigators concluded that any statements made by Moehringer to Dvorak were innocuous (6T198).

Dvorak's testimony, which was heard by the Court outside the presence of the jury, was, over 10 years earlier, when working

for Moehringer and experiencing personal domestic problems and separated and living alone in a new apartment, that Moehringer suggested, on several occasions, that she invite him to see her apartment (3T25-26). She did not characterize this as sexual harassment, then or now. His behavior was described as moody, erratic and that he played "head games" (3T36-37). She shortly thereafter quit her job at FMC for personal and professional reasons (3T37). Within a couple of years she returned to FMC, again worked for Moehringer (3T19-20), was given a number of salary increases, and achieved several promotions since the alleged incident. She did not testify that the environment at FMC was sexually harassing during Petitioner's tenure. She has no recent relevant experience with Moehringer

(3T31). Her testimony was not allowed before the jury because it was too remote to Petitioner's jury issues and was not probative of any pattern of an ongoing sexually harassing environment or cover-up (App. 40a). The FMC internal investigators also did not feel that it was of similar gravity to Petitioner's complaint (6T188, 189).

Before concluding their internal investigation , the FMC investigators urged Petitioner to provide them with names of other females allegedly sexually harassed by defendant Moehringer. Petitioner was reluctant to provide names and, in fact, never did (6T186). Petitioner advised Schunn that if assurances against retaliation were given in writing she would provide witnesses. In a taped conversation

surreptitiously recorded by Petitioner, between Petitioner and Schunn, Schunn indicated that she wanted to advise people at Princeton that Petitioner agreed under these circumstances, "written assurance," to identify her witnesses. Petitioner responded that she would do that. Schunn further asked if that was sufficient, to which Petitioner responded that it was (6T57-58).

Nick Derrough, FMC Corporate Manager for Equal Employment Opportunity, provided such written assurance by letter. The letter set forth the prohibition against retaliation for providing information which supports, clarifies, or documents a problem or charge of discrimination or harassment. It further sets forth the intent of FMC's EEO Policy to encourage internal resolution

of possible problems (6T39-40). At no time during trial did Petitioner testify that she provided names of other woman harassed by Moehringer to the investigators or any other employee of FMC, either before or after receiving such written assurance.

Petitioner, at trial, was referred to deposition testimony in which she was asked what she bases her claim that FMC had notice of Moehringer's sexual misconduct. Her response was that it was based on gossip. Upon further being asked at deposition as to who said anything to her about claimed sexual harassment or advances on behalf of Moehringer and what was said by that individual or those individuals, Petitioner responded that those were events that occurred more than two years previous to her deposition testimony and that she

hates to misquote people. She further stated that she hates to misquote situations, to misinterpret what was said, by whom it was said, what the words were, etc. She further alleges that they were impressions at the time and that she does not, at the time of the deposition, have a clear recollection that would permit her to be fair or accurate or reasonable about any of those past gossip comments. She has a memory that she heard gossip, but that was the extent of her memory. She did not have at deposition a clear enough recollection of who these people were. In fact, she had no recollection at all (6T45-47).

REASONS FOR DENYING WRIT

I. THE DISTRICT COURT'S DECISION THAT PETITIONER'S WRONGFUL DISCHARGE CLAIM WAS SUBSUMED BY THE STATUTORY CLAIMS (FEDERAL TITLE VII & NJLAD) DOES NOT PRESENT EITHER SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETION AND GRANT THE PETITION FOR CERTIORARI.

Petitioner was terminated from her position at FMC as she could not competently function in the position for which she was hired. This is amply supported by Respondent's Statement of the Case and the District Court's Opinion set forth in the Appendix submitted with the Petition.

Shortly after employment commenced, Moehringer, Petitioner's manager, became disappointed with Petitioner's performance. Her work significantly exceeded time estimates and was programmed in-

efficiently and unsuccessfully. Petitioner refused Moehringer's assistance and refused to demonstrate her work to him (8T141, 143-151). During work on a particular project, Petitioner avoided Moehringer, skipped scheduled meetings, hung-up when he called on the phone to inquire about the program, refused to communicate interim progress or to show him a single line of code, a flow diagram or documentation (8T 151-161). Moehringer's manager, Erjavec, repeated one of the assignments given Petitioner and concluded that Moehringer's assessment of Petitioner exceeding time limits was proper (9T28-29, 6T102-103, 165-166, 229-230). Eventually, she was terminated.

On March 9, 1981, Moehringer advised Petitioner he was recommending her termina-

tion, at which point she accused him of sexual improprieties. Petitioner's testimony and her allegations of sexual misconduct were found unworthy of belief by the District Court. The Court did find the defendants' witnesses believable.

> As will be noted by specific reference throughout this Opinion, the testimony of the plaintiff conflicted with that of the defendant Moehringer and with defense witnesses on many crucial points. This Court had ample opportunity to observe the demeanor of the witnesses and to assess their credibility. I find, as did the jury, that, where there was a conflict of testimony, the testimony of the plaintiff was not worthy of belief, and that the testimony of the defendants' witnesses was credible. (App. 10a).

Rule 17 of the Rules of the Supreme Court of the United States indicates that a

review on writ of certiorari is a matter of judicial discretion and will be granted only when there are special and important reasons therefor. No such special and important reasons exist in the case at bar.

Petitioner claims in her Petition that the District Court's decision to subsume the wrongful discharge claim in the statutory claims, affirmed by the Third Circuit Court of Appeals, is in conflict with decisions of other tribunals and therefore is worthy of review by this Court.

> A federal question raised by a Petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for

> the benefit of the particular litigants. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.' *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Respondent does not concede that Petitioner has raised a federal question or one "of substance," but, even if raised, to address it, would be to merely satisfy a scholarly interest in the issue when one considers the facts raised and Petitioner's lack of credibility as found by the Court and jury. To address the issue, the Court would be sitting for the benefit of a particular litigant, the Petitioner in the case at bar. As stated above and as found by the District Court, Petitioner was terminated because she was incapable of performing her job. This was amply

demonstrated by the evidence. Petitioner's claims of harassment and retaliation were found by the District Court not to be credible. Therefore, to accept the Petition would be to do what case law says this Court should not do, entertain an action without "special and important reasons."

Petitioner claims that the District Court's dismissal of the wrongful discharge count, affirmed by the Third Circuit Court of Appeals, is at variance with the applicable decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of New Jersey. Her reliance on the cases cited is misplaced.

The New Jersey Supreme Court has recognized a cause of action for wrongful

discharge in *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 536 A. 2d 237 (1988) and *Giudice v. Drew Chemical Corp.*, 104 N.J. 465, 517 A. 2d 448 (1986). But, both of these cases involved the question whether the employer's actions violated public policy and therefore gave rise to causes of action for wrongful termination. *Velantzas* apparently never pleaded a statutory violation for discrimination and therefore, the issue whether separate claims for statutory violations and wrongful discharge could co-exist was never raised. Giudice did not involve a discrimination issue.

Petitioner's reliance on *Lucas v. Brown & Root, Inc.*, 736 F. 2d 1202, 1206-1207 (CA8 1984), is misplaced as well. There, plaintiff's Title VII claim

was dismissed as its filing was untimely. Plaintiff was permitted to pursue wrongful discharge claims. The issue whether the tort and contract claims would be subsumed by a statutory claim was never addressed by the court.

Petitioner also relies upon *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) in support of her argument. This case is inapplicable as well. In *Alexander*, plaintiff, a black, was discharged from employment and filed a grievance under a collective-bargaining agreement which contained a non-discrimination clause. This grievance was submitted to arbitration. The arbitrator found that plaintiff had been discharged for cause. Subsequently, plaintiff filed an action in the District Court for a Title VII

violation, which claim was dismissed because of the prior arbitration. On certiorari, the Supreme Court held that plaintiff was entitled to a trial *de novo* for the Title VII racial discrimination claim. As stated by the court at page 163,

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective- bargaining agreement conflicts with Title VII, the arbitration must follow the agreement.

Therefore, the Court found that:

> that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the Court deems appropriate. *Alexander*, pages 164-5.

Alexander, therefore, has no application to the case at bar. It does not deal with the subsuming of state claims by federal acts.

Therefore, Petitioner has not met the necessary tests for this Court to grant the requested relief as she has failed to

demonstrate special and important reasons requisite for granting the relief sought and to demonstrate that the decision of the District Court, affirmed by the Third Circuit Court of Appeals, is in conflict with decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of New Jersey.

II. THE DISTRICT COURT APPLIED THE PROPER STANDARD OF PROOF IN AN EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The District Court applied the applicable Title VII law to the facts as properly ascertained by the court. The analytical model for evaluating a complaint of intentional impermissible employment discrimination in violation of Title VII continues to be *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973). That case teaches that a plaintiff alleging such discrimination must meet the initial burden at trial of establishing a *prima facie* case of discrimination.

To prove her *prima facie* case of sexual harassment, appellant must concretely prove the following:

a. That she belongs to a protected group;

b. That she was subjected to unwanted sexual advances;

c. That the harassment claimed was in fact based upon sex; and

d. That the conduct complained of affected the term, condition, or privilege of employment.

Henson v. City of Dundee, 682 F. 2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F. 2d 934 (D.C. Cir. 1981); *Tomkins v. Public Service Electric & Gas*, 568 F.2d 1044 (3d Cir. 1977).

When a plaintiff succeeds in establishing a *prima facie* case, the

defendant is then required "to articulate some legitimate, non-discriminatory reasons" for its actions. *McDonnell-Douglas Corporation v. Green*, 411 U.S. at 802. Thereafter, the plaintiff must prove "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253; 101 S.Ct. 1089, 1093; 67 L.Ed.2d 207, 209 (1981). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

To establish a *prima facie* case of sexual harassment based on the denial of a

tangible job benefit or adverse employment decision (*quid pro quo* harassment), the Petitioner herein must have proved (1) that she belonged to a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; and (4) that the employee's reaction to the harassment resulted in an adverse employment decision. *Henson v. Dundee, supra*.

To establish a *prima facie* case of sexual harassment based on a hostile or offensive work environment (non-*quid pro quo*), the Petitioner herein must have proved that (1) she belonged to a protected group; (2) that she was in fact subject to unwelcome harassment; (3) that the harassment complained of was based on sex; (4) that the harassment was of such nature and

magnitude as to affect a "term, condition, or privilege" of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial action. *Katz v. Dole*, 709 F.2d at 255; *Henson v. Dundee, supra* 682 F.2d at 903-05; *Bundy v. Jackson, supra* 641 F.2d at 943; *Ferguson v. E.I. DuPont de Nemours & Co., supra*, 560 F. Supp. at 1197-99.

Petitioner has failed to establish a *prima facie* case of sexual harassment - resulting in a tangible detriment to her employment (*quid pro quo* harassment) with FMC for at least three compelling reasons. First, Petitioner alleged only that Moehringer, her immediate supervisor, harassed her, made passes at her, made suggestive or offensive comments, walked

into her, or touched her. No other employee of FMC is alleged to have done anything remotely suggesting sexual harassment, and indeed the record is totally devoid of any evidence suggesting other agents of FMC acted in any such way. Thus, since the facts of the interaction between Petitioner and Moehringer were fully tried to the jury and the jury decided unequivocally that Moehringer did not assault Petitioner and did not maliciously interfere with her employment, it follows inexorably that the jury verdict against Petitioner precludes a finding by the court that some unknown, unnamed, uncharged, non-existent agent of FMC, on these non-facts, was responsible for sexually harassing her, thereby implicating this corporate defendant. Such finding by

the jury in favor of Moehringer compels the conclusion that FMC is also not responsible. Corporations, being legal fictions, can only act through their agents or employees. At a minimum, there would have to be an actor who is found to have done something adverse against plaintiff. Here, there is none. Second, Petitioner was clearly an employee-at-will, and had no reasonable expectation of or basis for a continuation of her employment with FMC. She failed to demonstrate to her employer that she was competent and qualified for continued employment. Her work habits and behavior justified some strong remedial action, such as termination. Thirdly, the decision to terminate Petitioner was independently reviewed and ratified by person who were not involved in, and at

that time had no knowledge of, the alleged harassment. (6T175). Thus, there is no basis for a finding that Petitioner's response to harassment resulted in the adverse employment decision to terminate her.

Petitioner has failed to establish a *prima facie* case of sexual harassment predicated on the maintenance of a hostile work environment (non-quid pro quo) because she has failed to establish that Moehringer's supervisors in any way condoned or acquiesced in alleged sexual harassment. First, as the jury verdict indicates, no such harassment on the part of Moehringer ever occurred. Second, as the findings of fact conclude, Petitioner did not even complain of alleged sexual harassment to anyone in authority at FMC's

facilities until after the decision to terminate her had been made and confirmed and ratified by the appropriate higher authorities. Third, the findings of facts herein demonstrate that, aside from Petitioner, no other female employee of FMC experienced any such harassment near in time as alleged or came forward to voice any such complaint or to support Petitioner. The occasion of the one female who testified as to a problem with Moehringer was so remote and so uncharacteristic of Petitioner's alleged specifics as to be of no probative value, even if fully credited. Finally, the record is clear that FMC does not condone sexual harassment and that they acted promptly, fairly, reasonably and properly to Petitioner's complaints by setting up an independent investigating

committee of professionals from outside the Princeton facility to evaluate the complaints. Even here, Petitioner in part attempted to damage the ability of the committee to determine the truth by refusing to furnish names of other women allegedly sexually harassed.

As stated by the District Court in its Opinion:

> The facts of the interaction between plaintiff and Moehringer were fully tried to the jury and the jury decided unequivocally that Moehringer did not assault plaintiff and did not maliciously interfere with her employment. Moreover, this Court, having heard all the evidence and evaluated the credibility of all the witnesses, agrees fully with the determination of the jury. The plaintiff's testimony that Moehringer sexually harassed her and made implied "passes" at her was wholly

> refuted by the credible testimony of Moehringer and others. Plaintiff's testimony was not credible and seems at best an attempt to twist and distort events, after she was aware of her impending termination, in order to serve her own interest. (App. 57-58a).

Petitioner suggests that because the court denied FMC's motion to dismiss the Title VII claims at the conclusion of her proofs, that she has made out a *prima facie* case. The court denied FMC's motion to dismiss at that time without prejudice to renew at the conclusion of the case as permitted by Court Rule 41(b) (8T85). It is therefore apparent that the court did not make a determination that Petitioner had made out a *prima facie* case at any time prior to rendering its opinion in which it concluded she had not. A compelling

argument could be made that the Court's ultimate determination that she had failed to make out a *prima facie* case was a belated granting of a 41(b) motion.

Even assuming, *arguendo*, that Petitioner had made out a *prima facie* case of employment discrimination under Title VII or the NJLAD, which she clearly did not, FMC has articulated legitimate, non-discriminatory reasons for its decision to terminate Petitioner's employment and Petitioner has not met her burden by the preponderance of the evidence that such reasons were a pretext for discrimination, *Texas Department of Community Affairs v. Burdine, supra*, 450 U.S. 248 (1981).

To the extent that Petitioner has alleged a retaliatory discharge or a cover-up for her action of coming forward

and accusing her supervisor of sexual discrimination, her claim must also fail. First, in order to prevail on such a claim, she must have established a *prima facie* case, which she has not, *Corley v. Jackson Police Department*, 566 F.2d 994 (5th Cir. 1978). As noted by the Court in *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318, 234 (D. Mass.), *aff'd* 545 F.2d 222 (1st Cir. 1976),

> The employee makes out a *prima facie* case by showing (1) that she engaged in protected activity, i.e., she opposed unlawful employment practices and participated in Title VII proceedings; (2) that her employer was aware of the protected activities; (3) that she was subsequently discharged and (absent other evidence tending to establish retaliatory motive); (4) that her discharge followed her

> protected activities within such a period of time that the Courts can infer retaliatory motives.

Here, Petitioner has again failed to meet the legal requirements for her allegations.

III. THE DISTRICT COURT WAS NEITHER PERSONALLY BIASED NOR PREJUDICED AGAINST PETITIONER.

The District Court properly employed its discretion in denying Petitioner's motion for recusal immediately prior to the presentation of evidence.

Recusal motions are made pursuant to 28 U.S.C. 144 and 28 U.S.C. 455. Sec. 144 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Here, Petitioner presented an affidavit to the District Court which was neither timely nor sufficient. Petitioner, in support of her motion for recusal, alleged, in part, conduct occurring in April 1986 and December 1986. She waited until subsequent to jury selection to move for recusal. She alleged in her affidavit conduct such as the Court's refusal to permit her to testify in narrative form;

the Court initially referring to her as "Mrs." and not "Dr."; the Court's refusal to ask all of her suggested *voir dire* questions; the Court requiring Petitioner to update Moehringer's deposition only ten days prior to the beginning of the trial (in fact it turned out to be 24 days before testimony began); the Court's refusal to permit Petitioner to depose FMC's Personnel Director to authenticate files when FMC was willing to stipulate to authenticity; etc.

The mere filing of the affidavit under Section 144 does not automatically disqualify a judge from hearing a case. *U.S. v. Townsend*, 478 F.2d 1072, 1073 (3d. Cir. 1973). It is the duty of the judge to determine whether the affidavit was timely and legally sufficient. Here, as stated above, the affidavit met neither prong.

Additionally, the Third Circuit has specifically held that only extra-judicial bias forms a basis for recusal under either Section 144 or Section 455. *Shank v. American Motors Corp.*, 575 F. Supp. 125, 128 (E.D. PA. 1983); *Johnson v. Trueblood*, 629 F.2d 287, 290-91 (3d. Cir. 1980), *cert. denied*, 450 U.S. 999, 101 S. Ct. 1704, 68 L. Ed. 2d 200 (1981). As is stated in *Shank*, 575 F. Supp. at page 129,

> Perhaps best summarizing the law on this point, it has been held that a motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant cases, nor on a particular judicial leaning or attitude derived from his experience on the bench. *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020 (5th Cir. 1981), *cert. denied*, 456 U.S. 960,

102 S. Ct. 2035, 72 L. Ed. 2d 483 (1982); *United States v. Peltier*, 553 F. Supp. 886, 889 (D.N.D. 1982).

Here, Petitioner's allegations do not in any way rise to the level of proving any personal bias or prejudice on the part of the Court. Petitioner's arguments on this issue are frivolous.

As stated above, Petitioner, in part, bases her allegation of bias on the fact that the court did not ask all of her *voir dire* questions.

The Court in its *voir dire* asked the prospective jurors questions eliciting their background; marital and family status; employment history; experience with courts as either a juror, witness or participant; their experience with computers; whether they or an associate have ever been

involved in a claim involving discrimination; whether they have feelings concerning allegations of sexual discrimination, etc. that would prevent them from serving as fair and impartial jurors; whether they or an associate has ever worked for FMC or a company in the chemical industry; whether they have prejudices against foreign born persons or women who work outside the home that would make it difficult or impossible to serve as fair and impartial jurors; and, whether they had any prejudices or biases for or against management or for or against employees supervised by management by virtue of their membership in management or because they were supervised by management.

Petitioner proposed twelve pages of 51 *voir dire* questions which included questions concerning the types of movies

jurors watched; whether they think that men treat each other differently in a work situation than they treat women; whether they have ever been in a situation where a person was cruel to someone just to get even; as well as numerous other questions.

As stated in *U.S. v. Salamone*, 800 F.2d 1216, 1224 (3rd Cir. 1986),

> Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*. *U.S. v. Rosales-Lopez*, 451 U.S. 182, 198, 101 S. Ct.

1629, 1634, 68 L.Ed.2d 22 (1981). This discretion extends to the determination of what questions should be asked to the potential jurors. See generally *Smith v. United States*, 431 U.S. 291, 308, 97 S. Ct. 1756, 1767, 52 L.Ed.2d 234 (1977); *United States v. McDonnell*, 573 F.2d 165, 166 (3rd Cir. 1978); *United States v. Segal*, 534 F.2d 578, 581 (3rd Cir. 1976). This 'testing' by *voir dire* remains a preferred and effective means of determining a juror's impartiality and assuring the accused of a fair trial. *United States v. Martin*, 746 F.2d 964, 973 (3rd Cir. 1984).

In the case at bar, the court has questioned the prospective jurors concerning their backgrounds as well as their attitudes about subjects germane to the issues at hand and whether they can be fair and impartial. The court saw fit in the

exercise of its broad discretion to limit the parties' proposed *voir dire*, but yet provided to the parties through its reasonably extensive examination of prospective jurors a reasonable and rational basis for an intelligent exercise of the right to challenge, whether for cause or peremptorily.

The parties knew enough about the background attitudes of the jurors to enable the parties to exercise intelligently their challenges. "The trial court has a serious duty to determine the question of actual bias." *United States v. Salamone*, 800 Fed.2d at pg. 1224, *Dennis v. United States*, 339 U.S. 162, 168, 70 S. Ct. 519, 521, 94 L.Ed. 734 (1950). Thus, the discretion committed to the trial court is "subject to the essential demands of fairness."

Aldridge v. United States, 288 U.S. 308, 310, 51 S. Ct. 470, 471, 75 L.Ed. 1054 (1931); *United States v. Wooten*, 518 F.2d 943, 945 (3rd Cir.), *cert. denied*, 423 U.S. 895, 96 S. Ct. 196, 46 L.Ed.2d 128 (1975); *United States v. Napoleone*, 349 F.2d 350, 353 (3rd Cir. 1965). Here, the court has fairly exercised its serious duty enabling the parties to assist the court in empanelling a fair and impartial jury.

Petitioner did not exercise any challenges. She expressed satisfaction with the jury empanelled. Her arguments on this issue are without any support in either the law or in the record.

Petitioner also seeks to raise allegations that Moehringer's counsel engaged in misstatements during summation;

expressed personal opinion as to the credibility of the witnesses and veracity of the evidence; engaged in unfounded attacks on Petitioner's character that were inflammatory and prejudicial; that the Trial Court erred in failing to restrict defense counsel's closing argument; and that the Trial Court improperly restricted Petitioner's summation and submitted excessively technical special interrogatories to the jury.

The closing argument of Moehringer's counsel was based solely on characterizing the evidence of record and drawing reasonable inferences tc ultimate facts which were fully supported by the evidence in the record. Obviously, these inferences differ from Petitioner's inferences. But that is beside the point. The truth is

that the inferences drawn and commented on were also accepted and believed by six jurors and the District Court judge. They do not please Petitioner; but, that is the essence of the American jury system.

There is no error or bias demonstrated in that the Court did not restrict defense counsel's closing argument or that it ordered Petitioner not to interrupt with objections during the argument. The Trial Court advised the Petitioner that all objections could be made after summation, and, in fact, did so permit.

Numerous courts have held that the scope of closing argument is a matter committed to the trial court's discretion. *U.S. v. Wendt*, 698 F.2d 933 (8th Cir. 1982).

As noted by the Court:

> In closing arguments both defense attorneys and prosecution attorneys are allowed reasonably wide latitude; they may strike hard blows based upon testimony and its inferences. *U.S. v. Birges*, 723 F.2d 66, certiorari denied, 104 S.Ct. 1926 (9th Cir. 1984).

Also, of course, the statements made at final argument must be taken in the context of the entire trial. *U.S. v. Gordon*, 688 F.2d 42 (8th Cir. 1982).

Additionally, a trial court judge has the discretion to control the conduct of a trial. It is not error to preclude discussion of the jury instructions and the law in the summation of a litigant. In jury trials, this is the unique province of the trial judge. To contend otherwise is

absurd. No prejudical error was committed because the trial court interrupted Petitioner before she completed her explanation of what she believed the law to be.

Finally, Petitioner's assertion that the special interrogatories were excessively technical and abstract and confusing is patently ridiculous. These instructions were largely patterned after the New Jersey Model Jury Instructions and were extensively reviewed in over three hours of discussion and negotiations with the Court. Petitioner expressed satisfaction with the end result. They are neither technical nor confusing. The fact that the jury expressed difficulty in understanding the term "malicious" is of no significance. When they requested

clarification of the term and the judge re-read the jury charge, the matter was ultimately resolved and the jury continued to deliberate and subsequently reached a verdict. They did not request or need additional clarification. No prejudicial error occurred.

For the reasons expressed above, Petitioner has failed to demonstrate any bias on the part of the Court or any prejudice to a party to the litigation.

CONCLUSION

For the reasons expressed herein, Petitioner's application for a Writ of Certiorari should be denied.

Respectfully submitted,

PELLETTIERI, RABSTEIN & ALTMAN

BY: Arthur G. Lash
ARTHUR G. LASH

Dated: March 28, 1984